(1) Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

Zachary Dion Arnold,

Petitioner,

v.

United States of America,

Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals, Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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41 pgs

QUESTIONS PRESENTED

1) Whether the United States Court of Appeals for the Ninth Circuit (hereinafter the "Ninth Circuit") erred in holding that Petitioner-Appellant Zachary Dion Arnold (hereinafter "Petitioner" or "Arnold") was not denied the right to a fair trial due to a deputy marshal sitting directly behind Petitioner while he testified.

2) Whether Petitioner was entrapped as a matter of law.

3) Whether Petitioner was denied the right to a fair trial when the district court refused to excuse a prospective juror who expressed his concerns to the court about his personal plans.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. There is no corporate disclosure statement required in this case under Rule 29.6.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

A copy of the opinion of the United States Court of Appeals for the Ninth Circuit which affirmed Petitioner's conviction and the certified copy of the Decree of the Court (9th Circuit) are annexed as Appendix A and B respectively. The opinion was not published, No. 01-10251. A copy of the Judgment of the District Court of the United States, District of Arizona is annexed as Appendix C.

JURISDICTION

The date on which the United States Court of Appeals, Ninth Circuit decided this case was April 18, 2002. No petition for rehearing was filed in this case. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

a) Sixth Amendment to the United States Constitution—Rights of accused in criminal prosecutions. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district, wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the

witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

b) Section One of the Fourteenth Amendment to the United States Constitution—Citizenship—Privileges and immunities—Due Process—Equal protection of laws.—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the states wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On December 15, 1999, February 14, 2000, and March 1, 2000, Donald Nelson (hereinafter "Nelson") purchased 13.1 grams (the "First Transaction"), 82.9 grams (the "Second Transaction") and 139.1 grams (the "Third Transaction") of cocaine base (hereinafter "crack" or "crack cocaine") respectively from Petitioner. Transcript of November 28, 2000 (hereinafter T. 11/28/00) at 96-126. Nelson was acting as a government informant for the Drug Enforcement Agency (hereinafter "DEA"), and he wore a "wire" or recording device during all three transactions, and he purportedly audio-taped all his telephone conversations with Petitioner from the time period of December 1999 to February 2000. T. 11/28/00 at 110, 186-209. Also, the DEA provided Nelson with money to buy the crack cocaine. T. 11/28/00 at 110.

Nelson, the informant, testified at the trial. Nelson has a familial relationship with Petitioner. Nelson had a

long-term relationship with Arnold's adopted sister and has a child with her; therefore, Nelson's child is Petitioner's nephew. T. 11/28/00 at 161.

In September 1999, Nelson was arrested for possessing three-hundred (300) pounds of marijuana in his mother's vehicle. T. 11/28/00 at 162. Nelson testified that he was a drug dealer and a long-term drug abuser of both marijuana and crack. T. 11/28/00 at 163-6. Nelson sold drugs "to support [his] habit." T. 11/28/00 at 179-82. Nelson entered into this relationship with the DEA in an effort to reduce his and his wife's possible sentences for a marijuana arrest and to prevent his mother's vehicle from being confiscated by the DEA. T. 11/28/00 at 231-2, 254-5.

At the time of Nelson's arrest for the possession of the three-hundred (300) pounds of marijuana, he told the officers that he "***would do whatever [he] had to do not to go back to prison***" (sic). T. 11/28/00 at 163. (Emphasis added.) Nelson also testified at trial that he would do anything to not go back to prison. T. 11/28/00 at 257. Nelson had previously served time in prison for theft in an incident where Nelson and his wife stole her grandfather's rifles and pawned the rifles. T. 11/28/00 at 178. As a condition of Nelson's arrest, he was to remain drug-free, but he continued to abuse drugs after his release and was arrested for his "dirty" or positive urinalysis tests. T. 11/28/00 at 167-71, 210-2.

Nelson testified that when he first moved to Douglas in 1998 that he purchased his crack from "friends in Douglas", but the drugs were not "good" in Douglas. T. 11/28/00 at 172. He stated that he began purchasing crack from Petitioner on a weekly basis in Phoenix because Petitioner "always sold it." T. 11/28/00 at 173.

Nelson purchased a small amount of crack (13.1 grams) from Petitioner on December 15, 1999. On February 4, 2000, he unsuccessfully attempted to purchase more crack from Petitioner. T. 11/28/00 at 194-5. On March 1, 2000, Petitioner was arrested after the Third Transaction with Nelson. T. 11/28/00 at 209.

Petitioner also testified at the trial. He testified that Nelson phoned him on numerous occasions from December through February and was very desperate for drugs. Because Nelson was a family member, Petitioner assisted him in obtaining drugs. Transcript of November 29, 2000 (hereinafter "T. 11/29/00") at 90.

Petitioner further testified that there were many other telephone conversations with Nelson that were not presented at trial. In fact, Petitioner testified Nelson telephoned Petitioner twice per week in January and throughout the month of February and pleaded for Petitioner to obtain drugs for Nelson. T. 11/29/00 at 93-98.

Nelson confirmed that there were more conversations between Petitioner and himself, but then recanted his testimony during the same line of questioning:

> GOVERNMENT: Were all of those conversations recorded?
>
> NELSON: No, I don't believe, not all of them.
>
> Q: Why not?
>
> NELSON: Couldn't tell you that.
>
> Q: Well, you had equipment from the DEA; is that right?
>
> NELSON: Yes.
>
> Q: You were instructed by Agent Wales to go ahead and record any communications you had with Mr. Petitioner?
>
> NELSON: Yes.
>
> Q: So didn't you follow his instructions?
>
> NELSON: Yes, I did.
>
> Q: So then you would have recorded all the conversations that you would have had.
>
> NELSON: Yeah, that's possible.
>
> Q: Well, maybe I misunderstood your answer then. My question, sir, was between December 15th and February

4th how many telephone calls did you have with Mr. Petitioner?

NELSON: However many I recorded.

T. 11/28/00, p. 214-5.

Nelson also testified regarding Petitioner's reaction (or lack thereof) regarding the lengthy span of time when the parties did not speak:

Q: All right. So if we have one recorded phone call, and we listened to that one recorded phone call, what if we hear no questions about, "Hey, where you been, man?" You have any explanation for that

A: No, none at all.

Q: In fact, and that would have been, what, from February 15th to December 15th (sic). That's four weeks; right?

A: Correct.

Q: Now, over four weeks. You have been going and seeing this guy over here, Zach Petitioner, what, 12 times? You were seeing him three or four times a week you told us; right?

A: Correct.

Q: You get arrested. You've not seen him until December 15th; correct?

A: Right.

Q: No one ever—you have no conversation with him that's recorded about, "Hey, man, what's been happening? I haven't heard from you in a long time."

A: No....

Q: We have got at least six weeks where there's no communication, there's no recorded conversation between you and Mr. Petitioner; right?

A: Correct.

Q: And that's the only conversation that you're telling us you had with Mr. Petitioner, isn't it?

A: Yes.

Q: And nowhere during the February 4th conversation that we have listened to between you and Mr. Petitioner have we heard, "Hey, where you been? What's been happening out there?" Did you hear that?

A: No.

T. 11/28/00 at 243-7.

Petitioner acquiesced to obtaining more drugs for Nelson in February and March, and this time in much larger quantities. T. 11/29/00 at 94-99. Petitioner was told by Nelson that the March transaction was "to be the last time that he'd call me, and he was telling me that he was borrowing money, and he said this was going to be it...he wouldn't bother me no more...And so [Petitioner] said okay." T. 11/29/00 at 98.

Nathaniel Poole (hereinafter "Poole") verified Petitioner's employment. Petitioner worked side-by-side Poole for Poole's janitorial company for one-and-a half (1 ½) years, and he never observed Petitioner under the influence of any substances. T. 11/29/00 at 59-63. At the trial, Betty Jackson, adoptive mother of Petitioner; Dawn Dillman, friend of Petitioner; and Shonteria Jackson, adoptive sister of Petitioner and mother of Nelson's child, testified that Petitioner is known as a truthful and law-abiding person. T. 11/29/00 at 70-1, 76-8, 83. Betty Jackson and Shonteria Jackson testified that Nelson is generally known as an untruthful person. T. 11/29/00 at 71, 84.

Petitioner's trial began on November 27, 2000. During the jury selection, prospective juror Scott Kramer (hereinafter "Juror Kramer") responded to the court's question regarding whether or not there was anything about the length of the trial or its daily schedule that would pose a

problem related to work, health or personal matter. T. 11/27/00 at 40. Juror Kramer responded that he was volunteering for his son's sixth grade class science camp, and he committed to it several months prior to his jury duty. T. 11/27/00 at 41. Petitioner requested that Juror Kramer be struck for cause because of the concerns that the juror would not have his mind on the case due to his plans. The court did not excuse Juror Kramer, and he ultimately became a member of the jury. T. 11/27/00 at 113, 121-123.

During the trial while Petitioner testified, a deputy marshal sat directly behind Petitioner. Before Petitioner testified, the court stated to the jury that:

> "Members of the jury, before we begin this testimony, I just wanted to explain that the deputy here is taking this seat here near the defendant. It is not for you to infer anything negative about the defendant because of that. It is simply a rule in this court that whenever we have a criminal case with a defendant and the defendant takes the stand, it is required procedure that the deputy marshal sit behind him when he's on the witness stand."
>
> T. 11/29/00 at 85-6.

On November 29, 2000, the jury acquitted Petitioner of culpability for the First Transaction and found Petitioner guilty to Counts II and III (the Second and Third Transactions). Petitioner was convicted by a jury on two (2) counts of Possession with Intent to Distribute Cocaine Base, 21 U.S.C. § 841(a)(1). Transcript on November 29, 2000 (hereinafter "T. 11/29/00") at 175-6. On April 5, 2001, the district court issued a judgment in this case and sentenced Petitioner to a term of 168 months. Sentencing T. at 22-3. On April 5, 2001, Petitioner filed his Notice of Appeal.

Petitioner filed a direct appeal to the Ninth Circuit on November 12, 2001. The Ninth Circuit conducted an oral argument for the case in April 2002. On April 18, 2002, the

Ninth Circuit issued its opinion and affirmed Petitioner's conviction (attached hereto as Appendix A).

REASONS FOR GRANTING THE PETITION

I. THE PRESENCE OF A DEPUTY MARSHAL BEHIND PETITIONER WHILE HE TESTIFIED DENIED PETITIONER THE RIGHT TO A FAIR TRIAL.

A claim for deprivation of due process will succeed if the trial court's errors rendered the trial arbitrary or unfair. A right to a fair trial is a fundamental liberty interest secured by the Fourteenth Amendment. *See, e.g., Estelle v. Williams,* 425 U.S. 501, 503 (1976). In most cases involving claims of due process deprivations, courts require a showing of identifiable prejudice to the accused. *Sheppard v. Maxwell,* 384 U.S. 333, 352 (1966) (Court reversed where it was apparent that presence of press at the trial prejudiced and disadvantaged defendant; Trial court must take strong measures to ensure that the balance is never weighed against the accused.).

This Court has often granted certiorari where the decision below is, or appears to be, out of line with the authorities. *See, e.g., Braen v. Pfeifer Transportation Company,* 361 U.S. 129, 130 (1959). The Ninth Circuit's decision in *Petitioner* is such a decision.

This Court has long supported the proposition that the Sixth Amendment provides that an accused shall enjoy the right to a trial by an impartial jury. *Parker v. Gladden,* 385 U.S. 363, 364-5 (1966) (reversed where bailiff stated to jury that defendant was guilty and "If there is anything wrong [in finding him guilty] the Supreme Court will correct it.").

Although in *Holbrook v. Flynn,* 475 U.S. 560, (1986), the Court overturned the district court's decision reversing defendant's conviction due to four uniformed and armed officers in the first row of the courtroom immediately behind the defendant, the Court held that it is possible that the sight

of a security force within the courtroom might, under certain conditions, create the impression in the minds of the jury that the defendant is dangerous and untrustworthy. *Id.* at 567. The court also stated that central to the right of a fair trial, guaranteed by the U.S. Constitution, an "accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial...." *Id., citing, Taylor v. Kentucky,* 436 U.S. 478, 485 (1978). Certain practices which pose a threat of the fairness of the fact-finding process must be subjected to "close judicial scrutiny." *Id.* at 568. "Whenever a courtroom arrangement is challenged as inherently prejudicial, the question is not whether jurors actually articulated a consciousness of some prejudicial effect, but rather an unacceptable risk is presented of impermissible factors coming into play...." *Id.* at 569, *citing, Estelle v. Williams,* 425 U.S. 501, 505 (1976). In fact, the Court held that it is possible that a jury will not infer anything at all from the presence of guards. "If they are placed **at some distance from the accused,** security officers may well be perceived more as elements of an impressive drama than as reminders of the defendant's special status." *Id.* (Emphasis added.)

Further, the presence of the deputy marshal directly behind Petitioner is analogous to a defendant appearing before a jury in shackles:

> This right [not to appear before a jury in shackles] springs from the basic principle of American jurisprudence that ***a person accused of a crime is presumed innocent until his guilt has been established*** beyond a reasonable doubt. ***For this presumption to be effective, courts must guard against practices which unnecessarily mark the defendant as a dangerous character or suggest that his guilt is a foregone conclusion.*** As one court has observed, if a defendant is to be presumed innocent, he must be allowed the indicia of innocence.

> Though not articulated in the Constitution, the presumption of innocence is considered a basic component of the right to a fair trial guaranteed by the Fourteenth Amendment.

Harrell v. Israel, 672 F.2d 632, 635 (7th Cir. 1982). (Emphasis added.) *See also, Wilson v. McCarthy*, 770 F.2d 1482, 1484 (9th Cir. 1985).

Obviously, the danger inherent in such procedures is ***a jury will presume the defendant's guilt based on appearance alone.*** (Emphasis added.) Ralph H. Kohlmann, *The Presumption of Innocence: Patching the Tattered Cloak after Maryland v. Craig*, 27 St. Mary's L.J. 389, 410-1 (1996). *See also, e.g., U.S. v. Gambina*, 564 F.2d 22, 24 (8th Cir. 1977) (noting that absence of physical indicia of innocence undermines presumption of innocence).

Furthermore, there was no plausible reason for placing a deputy marshal next to Petitioner during his testimony. *See, e.g., State v. Peacher*, 280 S.E. 2d 559, 574 (W.Va. 1981) (in determining the necessity of guards in the courtroom, a court should consider whether defendant is in custody or free on bail at time of trial, the seriousness of the charges, and the defendant's character, particularly evidence of prior escapes or attempted escapes). In this case, there was absolutely no reason to place the deputy marshal next to Petitioner. He never attempted to escape at any time. He was very peaceful during the trial, and not once, did the judge reprimand Petitioner for any behavior in the courtroom.

Even if the court felt there was a need for courtroom security, there were other, less obvious, methods of insuring courtroom security.[1] As in *Holbrook*, the marshal could have been seated in the rows of the courtroom. The marshal

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[1] During the oral argument before the 9th Circuit, the government confirmed that the district court judge was a rather new judge and was not familiar with normal security procedures. Further, the government's attorney confirmed that in her experience, a marshal never sits next to a defendant while the defendant testifies.

could have also been placed on the other side of the courtroom door, out of the jury's sight. In that scenario, the jury never would have been aware of the added protection and no prejudice would have resulted to Petitioner. There were less onerous methods to maintaining courtroom security without a marshal following Petitioner to the jury stand.

The presence of the federal marshal directly behind Petitioner was highly prejudicial and should not have transpired before a jury. Furthermore, when Nelson, who was also an individual facing substantial criminal charges, testified, no deputy marshal sat behind him which could have potentially inferred to the jury that Nelson's testimony was more reliable. A marshal seated next to a defendant during a jury trial is likely to create the impression in the minds of the jury that the defendant is dangerous or untrustworthy.

The argument that this error is harmless is disingenuous. The evidence against the Petitioner was not overwhelming, and it is very likely, that the jury did not accept the Petitioner's defense of entrapment because the presence of the marshal prejudiced the Petitioner's testimony and gave unsupported credence to Nelson's testimony.

During the proceedings, Petitioner's counsel did not object; therefore, the error was reviewed by the Ninth Circuit under the "plain error" standard of review. The Supreme Court has defined "plain error" as error (1) seriously affecting substantial rights and (2) having an unfair and prejudicial impact on the jury's deliberations and judicial proceedings. *U.S. v. Young*, 470 U.S. 1, 16-17 n 14 (1985).

Although Petitioner did not raise this issue at the district level, review is necessary to prevent a miscarriage of justice. Plain errors or defects affecting a defendant's substantial rights may be noticed by the court although they were not brought to the district court's attention through an objection. Also, it is highly probable that Petitioner did not

object to the marshal based on the trial court's statements that the presence of the federal marshal was "required procedure." Statements such as this by the trial court misled Petitioner into believing that the court was merely following the correct procedures of the district court.

In cases where the plain error seriously and prejudicially affects the defendant's substantial rights, this Court must reverse cases in order to prevent a miscarriage of justice. *Young, surpa,* at 16-17 n 14. In this case, Petitioner's rights were seriously and prejudicially affected. Because this improper and highly prejudicial act occurred in front of the jury, the balance of evidence was upset and Petitioner was denied a fair trial in violation of the Sixth and Fourteenth Amendments of the Constitution of the United States. Therefore, this Court must reverse the convictions of Petitioner.

II. THE GOVERNMENT'S CONDUCT CONSTITUED ENTRAPMENT OF THE DEFENDANT.

> Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the laws scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the

> end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should reasonable set its face.
>
> --Quotation of Justice Brandeis from his dissent in *Olmstead v. U.S.*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

This Court has firmly recognized the defense of entrapment. *Sorrells v. U.S.*, 287 U.S. 435 (1932). The function of law enforcement is to prevent crime and apprehend criminals. Their function does not include the manufacturing of the crime. However, a "different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." *Id.* at 442. In those cases, the stealth and strategy used as police methods become as objectionable as the coerced confession and the unlawful search. *Sherman v. U.S.*, 356 U.S. 369, 372-3 (1958) (conviction reversed where the Court did not choose from conflicting witnesses nor did it judge the credibility of witnesses, but rather reached its conclusion from the undisputed testimony of the prosecution's witnesses).

Inducement is government conduct that creates a substantial risk that an otherwise law-abiding person will commit a crime. *U.S. v. Manarite*, 44 F.3d 1407, 1418 (9th Cir.), *cert. denied*, 516 U.S. 851 (1995). The government must prove that the defendant was predisposed to commit the crime *prior* to being approached by the government. *Jacobson v. U.S.*, 503 U.S. 540, 553 (1992). In determining whether the defendant was predisposed to commit the crime before

being approached by the government agents the following may be considered:

1) the defendant's character and reputation;
2) whether the government initially suggested criminal activity;
3) whether the defendant engaged in the activity for profit;
4) the nature of the government's inducement; and
5) any other factors related to predisposition.

See U.S. v. McClelland, 72 F.3d 717, 722 (9th Cir. 1995), *cert. denied*, 517 U.S. 1148, (1996).

Furthermore, where the government "has induced an individual to break the law and the defense of entrapment is at issue, the prosecution must prove beyond a reasonable doubt that the defendant was predisposed to commit the crime prior to first being approached by government agents". *Tucker*, 133 F.3d 1208, 1217 (9th Cir. Cal. 1998). *See also, Jacobson v. U.S.*, 503 U.S. 540 (1992) (Supreme Court reversed where government did not prove that defendant was predisposed to commit crime of receiving child pornography in violation of the Child Protection Act, independent of government's acts).

Petitioner testified that Nelson called him repeatedly and begged him for drugs. T. 11/29/00 at 93-98. However, only a few tapes of conversations were played at the trial. Petitioner testified that there were more conversations than the ones testified to at trial. T. 11/28/00 at 191, 212-216.

Even Nelson, the only person with control of the tape-recording device, admitted that there were more conversations than presented at trial but then quickly changed his answer to comply with the answer the government expected. During cross-examination, Nelson stated that "not all of [the telephone conversations]" were recorded. T. 11/28/00 at 214. However, a few seconds later he changed his answer to the only conversations that he had

with Petitioner were the ones that he recorded. T. 11/28/00 at 215. Petitioner and Nelson's testimony demonstrates that Nelson only taped certain conversations or gave tapes to the government that were more helpful to the government's case.

Also, the tapes presented at trial demonstrated that Petitioner was entrapped. Nelson testified that he purchased crack from Petitioner on a weekly basis for over one year. However, in the telephone conversations presented at trial, Petitioner does not ask Nelson "Where have you been?". It is unbelievable that Petitioner would not inquire regarding Nelson's whereabouts if Nelson had really been purchasing drugs from him on a weekly basis for a lengthy amount of time. This is yet another instance where an agent of the government induced an unsuspecting individual into committing a crime.

It is patently clear that the government through Nelson induced Petitioner to commit the crimes because Nelson initiated the contact with Petitioner and badgered Petitioner for larger and larger quantities of crack. Nelson's conduct was "trickery, persuasion or fraud of a government agent" in order to induce Petitioner into providing him with crack cocaine. *See also, U.S. v. Simas*, 937 F.2d 459, 462 (9th Cir. 1991). The only evidence to show that Petitioner was predisposed to commit the crime was from Nelson, the government's agent. There is uncontradicted evidence that Nelson made the initial suggestion of criminal activity. Nelson testified that he made the initial contact with Petitioner at the DEA office. T. 11/28/00 at 185. Petitioner did not solicit Nelson.

There is no evidence in the record, which the jury would have concluded, that Petitioner would have benefited financially from the transactions. When he was arrested on the Third Transaction, he had government money in his pocket. Furthermore, the government presented no evidence of Petitioner's financial benefit. Rather, evidence was presented at trial that Petitioner was a working class individual working in the janitorial field.

The other relevant issue to Petitioner's predisposition to commit the crime is Petitioner's character and reputation. The government did nothing to challenge Petitioner's character and reputation. The evidence demonstrated Petitoner was generally known as trustworthy, law-abiding and had an exemplary work history.

This case contains undisputed evidence that makes it patently clear that the government induced an otherwise innocent person (Petitioner) to commit the illegal act by trickery, persuasion or fraud of a government agent (Nelson). *See, Tucker,* 113 F.3d at 1217. *See also, Sherman v. U.S.,* 356 U.S. 369, 382 (1958), (Frankfurter, J., concurring) ("The power of government is abused and directed to an end for which it is not constituted when employed to promote rather than detect crime and to bring about the downfall of those who, left to themselves, might well have obeyed the law. Human nature is weak enough and sufficiently beset by temptations without government adding to them and generating crime.").

The jury found Petitioner guilty even though an entrapment instruction was presented. In the *Sorrells* case, Justice Roberts urged that such a judgment, aimed at blocking off areas of impermissible police conduct is appropriate for the court and not the jury. "The protection of its own functions and the preservation of the purity of its own temple belongs only to the court. It is the province of the court and of the court alone to protect itself and the government from such prostitution of the criminal law. The violation of the principles of justice by the entrapment of the unwary into crime should be dealt with by the court no matter by whom or at what stage of the proceedings the facts are brought to its attention." 287 U.S. at 457.

In this case, undisputed facts demonstrate Petitioner was entrapped into the offense. First, Nelson was an admitted drug dealer and addict who was arrested with three hundred (300) pounds of marijuana in his mother's vehicle. Nelson testified, "he would do anything not to go to prison." Nelson, his wife and his mother would directly

benefit from Nelson's cooperation of providing additional individuals for prosecution. Nelson and Petitioner had a familial relationship wherein Nelson was able to apply pressure to Petitioner. At all times during the transactions, Petitioner was employed full-time as a janitor. Months passed between the transactions and Petitioner did not question Nelson's whereabouts in-between transactions even though Nelson stated that he purchased drugs from Petitioner, at least, on a weekly basis. In addition, Nelson had sole control of the tape recording device to tape telephone conversations even though Petitioner and Arnold testified that more conversations occurred during that period.

Further, Nelson testified that he was under the influence of drugs prior to his transactions with Petitioner, during his transactions with Petitioner, and after his transactions with Petitioner. Nelson dealt in illegal drugs for the purpose of supporting his habit. Nelson tested positive for a total of 24 out of 24 urinalysis tests taken between the dates of November 22, 1999 to July 6, 2000. *See* U.S. Pretrial Services District of Arizona Memorandum dated November 27, 2000. The evidence is overwhelming that Nelson had the motive and the opportunity to contribute to the entrapment of Petitioner.

Petitioner was entrapped by Nelson, a government agent. Nelson received favorable treatment due to his cooperation. *See* Letter dated November 22, 2000 from U.S. Dept. of Justice to Nelson. His wife also cooperated, and Nelson expected that his wife would receive favorable treatment due to his cooperation. T. 11/28/00 at 229-237, 254-5. Furthermore, his mother's vehicle was not confiscated due to Nelson's cooperation. T. 11/28/00 at 254-5.

Considering the relevant factors, the government did not present sufficient evidence to show that Petitioner was predisposed to commit these crimes and, accordingly, the conviction must be reversed.

III. THE TRIAL COURT VIOLATED PETITIONER'S RIGHTS IN THE IMPANELMENT OF THE JURY BY FAILING TO DISMISS A JUROR WHO EXPRESSED CONCERNS ABOUT THE TRIAL INTERFERING WITH HIS PERSONAL PLANS.

In *Irvin v. Dowd*, 366 U.S. 717, 722 (1961), the Supreme Court discussed the magnitude of an impartial jury:

> "The failure to accord an accused a fair hearing violates even the minimal standard of due process....A fair trial in a fair tribunal is a basic requirement of due process....In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as "indifferent as he stands unsworne." His verdict must be based upon the evidence developed at trial.
>
> This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of the accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard."

In a jury trial, the primary finders of fact are the jurors. A juror's overriding responsibility is to stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction. *See Horning v. District of Columbia*, 254 U.S. 135 (1920) (Holmes J.) ("The jury has the power to bring a verdict in the teeth of both law and facts...the technical right, if it can be so called, to decide against the law and the facts..."). For this reason, a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with

such a verdict. *See United Brotherhood of Carpenters v. U.S.*, 330 U.S. 395, 408 (1947).

In *U.S. v. Tegzes*, 715 F.2d 505, 507 (11th Cir. 1983), the court stated that the conduct of voir dire of a jury panel is a matter directed to the sound discretion of the trial judge, subject to the *essential demands of fairness*. (Emphasis added.) Furthermore, the constitutional standard of fairness requires that the criminally accused have a panel of impartial, indifferent jurors. *Id.*

During the jury selection, prospective juror Scott Kramer (hereinafter "Juror Kramer") responded to the court's question regarding whether or not there was anything about the length of the trial o its daily schedule that would pose a problem related to work, health or personal matter. T. 11/27/00 at 40. Juror Kramer responded that he was volunteering for his son's sixth grade class science camp, and he committed to it several months prior to his jury duty. T. 11/27/00 at 41.

Petitioner objected to the selection of Juror Kramer and demanded he be struck for cause. Petitioner was justifiably concerned that the juror would not have his mind on the case due to his vacation plans. Despite Petitioner's objection, the court did not excuse Juror Kramer, and he ultimately became a member of the jury. T. 11/27/00 at 113, 121-123.

The facts established by the court do not support the court's finding that Juror Kramer should not have been struck from the jury pool for cause. Juror Kramer expressed reservation by demonstrating his state of mind to be of unwillingness to commit to the jury process. The court's denial to strike Juror Kramer deprived Petitioner of his right to a fair and impartial jury in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States and therefore, Petitioner's conviction must be reversed.

CONCLUSION

Petitioner was entrapped into committing the offenses for which he was ultimately tried and convicted. Additionally, Petitioner was denied the right to a fair trial when the deputy marshal sat directly behind Petitioner while Petitioner presented his testimony to the jury. Further, the court refusal to excuse a prospective juror who was obviously concerned with other matters was deeply prejudicial to Petitioner. In this case, a jury convicted Petitioner, but the balance of evidence was tipped from Petitioner's favor due to the errors at the trial involving the deputy marshal next to Petitioner during his testimony and the placement of the juror on the panel who should have been excused.

For all the foregoing reasons, Petitioner respectfully requests that this Court grant this writ of certiorari.

RESPECTFULLY SUBMITTED this 12th day of July 2002.

ROSENQUIST & ASSOCIATES

Anders Rosenquist, Jr.
80 East Columbus
Phoenix, AZ 85012
Attorneys for Petitioner-Appellant
Zachary Dion Petitioner

No.

IN THE

Supreme Court of the United States

Zachary Dion Arnold,

Petitioner,

v.

United States of America,

Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals, Ninth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Anders Rosenquist
Counsel of Record
ROSENQUIST & ASSOCIATIES
80 East Columbus
Phoenix, AZ 85012
Phone: 480/488-0102

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APPENDIX A – MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, NO. 01-10251 FILED APRIL 18, 2002

APPENDIX B – CERTIFIED COPY OF THE DECREE OF THE COURT (9TH CIRCUIT) FILED ON MAY 10, 2002

APPENDIX C – JUDGMENT IN UNITED STATES OF AMERICA V. ZACHARY DION PETITIONER (UNITED STATES DISTRICT COURT, DISTRICT OF ARIZONA), FILED APRIL 5, 2001

APPENDIX A

FILED
APR 18 2002
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff - Appellee,
v.
ZACHARY DION ARNOLD, aka Zachary Dickson aka Zachary Montague; "Dog,"
Defendant - Appellant.

No. 01-10251
D.C. No. CR-00-00223-SRB

MEMORANDUM

Appeal from the United States District Court
for the District of Arizona
Susan R. Bolton, District Judge, Presiding

Argued and Submitted April 11, 2002
Stanford, California**

Before: O'SCANNLAIN and TALLMAN, Circuit Judges, and "KING," District Judge.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by NINTH CIRCUIT RULE 36-3.

** Special session held at Stanford University Law School.

*** Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

Zachary Arnold appeals from the judgment of conviction entered after a jury found him guilty of two counts of possession with intent to distribute cocaine base in violation of 21 U.S.C. § 841(a)(1). He challenges the legality of his conviction and his sentence. We have jurisdiction under 28 U.S.C. § 1291 and we affirm.

Arnold first contends that the district court erred in denying his Rule 29 motion for judgment of acquittal based on his proof of the defense of entrapment. Because there were conflicting assertions of fact relevant to the entrapment issue, the resolution of which was a credibility question for the jury, see United States v. Griffin, 434 F.2d 978, 981 (9th Cir. 1970), we are precluded from determining, as a matter of law, that the Government entrapped Arnold, see United States v. Davis, 36 F.3d 1424, 1430-31 (9th Cir. 1994). We therefore affirm the district court's denial of Arnold's Rule 29 motion for acquittal□

Arnold also contends that the district court erred in denying his request for a downward departure based on sentencing entrapment. We may not review a district court's discretionary refusal to depart downward from the Sentencing Guidelines. See United States v. Tam, 240 F.3d 797, 805 (9th Cir. 2001). We may, however, review the district court's factual findings in the sentencing phase for clear error. See United States v. Fox, 189 F3d. 1115, 1118 (9th Cir. 1999), cert. denied, 528 U.S. 1098 (2000). There is no evidence of error, however, in this case.

The district court considered the relevant evidence it heard at trial and made the factual findings necessary to reject Arnold's sentencing entrapment defense. See United States v. Parrilla, 114 F.3d 124, 127-28 (9th Cir. 1997) (holding that the sentencing court must make "express factual findings" on the record regarding the defendant's burden of proof). We therefore affirm the sentencing decision.

Next, Arnold argues that he was denied the right to a fair trial when, without objection, a deputy marshal escorted him to the stand and sat directly behind him near a door leading to a hallway outside of the courtroom while he testified. Under the plain error doctrine, Arnold is unable to demonstrate an error as any inherent prejudice that may

have resulted from the security measures taken in this case were neutralized by the district court judge's immediate curative instruction. See Holbrook v. Flynn, 475 U.S. 560, 567 (1986) (holding that while excessive security measures may violate an accused's constitutional right to a fair trial, not every security arrangement singling out the accused is unconstitutional); United States v. Milner, 962 F.2d 908, 911-12 (9th Cir. 1992) (holding that the district court judge's curative instruction sanitized his inappropriate comments regarding the security measures taken on behalf of the defendant).

Fourth, Arnold contends he was denied the right to a fair trial when the district court refused to excuse a prospective juror and then refused to grant Arnold's motion to strike the juror for cause. The district court judge was in the best position to evaluate whether the juror's scheduling conflict formulated a legal basis upon which to excuse him from jury service. See United States v. Beard, 161 F3d 1190, 1194 (9th Cir. 1998) (quoting United States v. Egbuniwe, 969 F.2d 757, 761 (9th Cir. 1992) (internal quotations omitted). Because the district court concluded that the juror could adequately deliberate in spite of the conflict, it was not an abuse of discretion to refuse to excuse him and to deny Arnold's motion.

Finally, Arnold claims that the prosecutor's comment during closing argument that the amount of drugs involved was a "lot of crack" constituted plain error. Because this statement was consistent with the evidence presented at trial, we hold that there was no error. See United States v. Cooper, 173 F.3d 1192, 1203 (9th Cir. 1999) (holding that a defendant must show that the prosecutor's misconduct materially affected the verdict).

AFFIRMED.

Arnold also contends in this context that the Government's conduct was so outrageous that it violated due process principles. There is no evidence in the record, however, warranting a reversal of conviction on this ground. See

United States v. Bonanno, 852 F.2d 434, 437-38 (9th Cir. 1988); United States v. Reynoso-Ulloa, 548 F.2d 1329, 1338-39 (9th Cir. 1977).

APPENDIX B

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
95 Seventh Street, P.O. Box 193939
San Francisco, CA 94119-3939

May 10, 2002

USDC, Phoenix
District of Arizona (Phoenix)
Sandra Day O'Connor U.S. Courthouse
401 W. Washington Street, SPC 1
Suite 130
Phoenix, AZ 85003

C.A. No.	TITLE	AGENCY/ D.C. NO.
01-10251	USA v. Arnold	CR-00-00223-SRB

Dear Clerk:

The following document (s) in the above listed cause (s) is (are) being sent to you under cover of this letter.

☐ X☐ Certified copy of the Decree of the Court
☐ ☐ Judgment of the National Labor Relations Board
☐ ☐ Certified copy of the Entry of Dismissal

The record on appeal will follow under separate cover.

Please acknowledge receipt of the enclosed copy of this letter.

Very truly yours,

Cathy A. Catterson
Clerk of Court

By: s/Jane Cross
Jane Cross
Deputy Clerk

Enclosures (s)
cc: ALL COUNSEL

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 01-10251
CT/AG#: CR - 00-00223 - SRB

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

ZACHARY DION ARNOLD, aka Zachary Dickson aka Zachary Montague; "Dog"
Defendant - Appellant

APPEAL FROM the United States District Court for the District of Arizona (Phoenix).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona (Phoenix) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered April 18, 2002

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST
May 10 2002
by: s/Jane Cross
Deputy Clerk

APPENDIX C

X Filed ___ Lodged
___ Received ___ Copy
APR 05 2001
CLERK U S DISTRICT COURT
DISTRICT OF ARIZONA
By s/(undecipherable) Deputy

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

United States of America

v.

Zachary Dion Arnold
Aliases: Zachary Dickson; Zachary Montague; "Dog"
1647 W. Pima
Phoenix, AZ 85015

USM#: 45056-008 DOB: 9-14-73 SSN: 527-49-5703
(Also uses DOB: 9-13-73; 9-14-74) (Also uses SSN: 527-49-5702; 527-92-8890)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed on or After November 1, 1987)

No. CR 00-00223-001-PHX-SRB
Alan Simpson (Appointed)
Attorney for Defendant

THERE WAS A verdict of guilty as to Count 2 and 3 of the Indictment.

THERE WAS A verdict of not guilty as to Count 1 of the Indictment; the defendant is acquitted and discharged as to this/these counts.

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF violating Title 21, USC §841, Possession with Intent to Distribute Cocaine Base, a Felony offense, as charged in Count 2 of the Indictment; Title 21, U.S.C. §841, Possession with Intent to Distribute Cocaine Base, a Felony offense, as charged in Count 3 of the Indictment.

IT IS THE JUDGMENT OF THIS COURT THAT the defendant is hereby committed to the custody of the Bureau of Prisons for a term of **ONE HUNDRED SIXTY EIGHT (168) MONTHS** on Count 2 and 3, said counts to run concurrently, with credit for time served. Upon release from imprisonment the defendant shall be placed on supervised release for a term of **FIVE (5) YEARS** on Count 2 and 3, said counts to run concurrently. The Court recommends that the defendant be placed in an institution in Arizona.

CRIMINAL MONETARY PENALTIES

The defendant shall pay to the Clerk, U.S. District Court, Attn: Finance, Room 1400, 230 North First Avenue, Phoenix, Arizona 85025, the following total criminal monetary penalties:

SPECIAL ASSESSMENT: $200.00 FINE: $0.00
RESTITUTION: $0.00

Defendant does not have the ability to pay a fine or only has the ability to pay a fine less than the guideline minimum.

All monetary penalties are due immediately or in regular monthly installments. If incarcerated, payments shall begin under the Bureau of Prisons Inmate Financial Responsibility Program. Any unpaid balance shall become a condition of supervision and shall be paid within 90 days of the expiration of supervision.

The total special assessment of $200.00 shall be paid pursuant to Title 18, United States Code, Section 3013 for Count 2 and 3 of the Indictment.

Until all restitutions, fines, special assessments and costs are fully paid, the defendant shall immediately notify the Clerk, U.S. District Court, of any change in name and address.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant is placed on supervised release for a term of **FIVE (5) YEARS** on Count 2 and 3, said counts to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

For offenses committed on or after September 13, 1994: The defendant shall refrain from any unlawful use of a controlled substance. Pursuant to 18 USC §3563(a)(4) and 3583(d) the defendant shall submit to one drug test, within 15 days of release from imprisonment and such other periodic drug tests thereafter, as directed from time to time by the probation officer.

The defendant shall not possess a firearm, ammunition or other dangerous weapon as defined in 18 U.S.C. §921.

The defendant shall comply with the standard conditions of supervision:

1) You shall not commit another federal, state, or local crime during the term of supervision.

2) You shall not leave the judicial district or other specified geographic area without the permission of the Court or probation officer.

3) You shall report to the Probation Office as directed by the Court or probation officer, and shall submit a truthful and complete written report within the first five days of each month.

4) You shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

5) You shall support your dependents and meet other family responsibilities.

6) You shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

7) You shall notify the probation officer at least ten days prior to any change of residence or employment.

8) You shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician. Possession of controlled substances will result in mandatory revocation of your term of supervision. If ordered by the Court to participate in a drug and/or alcohol abuse treatment program, you shall totally abstain from the use of any alcoholic beverages or other intoxicants during and after the course of your treatment.

9) You shall not frequent places where controlled substances are illegally sold, used, distributed or administered, or other places specified by the Court.

10) You shall not associate with any persons engaged in criminal activity, and shall no associate with any person convicted of a felony unless granted permission to do so by the probation officer.

11) You shall permit a probation officer to visit at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

12) You shall immediately notify the probation officer (within forty-eight (48) hours if during a weekend or on a holiday) of being arrested or questioned by a law enforcement officer.

13) You shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court.

14) As directed by the probation officer, you shall notify third parties of risks that may be occasioned by your criminal record or personal history or characteristics, and shall permit the probation officer to make such notification and to confirm your compliance with such notification requirement.

15) You shall refrain from possessing a firearm, destructive device, or other dangerous weapon. Possession of a firearm will result in mandatory revocation of your term of supervision. This prohibition does not apply to misdemeanor cases unless special condition imposed by Court.

16) Unless suspended by the Court, you shall submit to one substance abuse test within the first 15 days of supervision and at least two periodic substance abuse tests thereafter, pursuant to 18 U.S.C. § §3563(a)(4) and 3583(d);

17) If supervision follows a term of imprisonment, you shall report in person to the Probation Office in the district to which you are released within seventy-two (72) hours of release.

18) The balance of any financial obligation ordered by this Court shall be paid in regular monthly installments approved by the probation officer, the full amount to be

19) paid in 90 days prior to expiration of supervision. You will notify the probation officer of any material change in your economic circumstances that might affect your ability to pay restitution, fines, or special assessments.

The defendant shall also comply with the following special conditions:

1. You shall participate as instructed by the probation officer in a program of substance abuse treatment which may include testing for substance abuse. You shall contribute to the cost of treatment in an amount to be determined by the probation officer.

2. You shall submit to search of person, property, vehicles, business, and residence to be conducted in a reasonable manner and at a reasonable time by, or at the direction of, the probation officer.

3. You shall provide the probation officer access to any requested financial information.

4. You are prohibited from owning, maintaining or using a firearm.

5. You shall not be involved with gang activity, possess any gang paraphernalia or associate with any person affiliated with a gang.

UNLESS PREVIOUSLY WAIVED, THE DEFENDANT IS ADVISED OF THE RIGHT TO APPEAL THE IMPOSED SENTENCE BY FILING A NOTICE OF APPEAL WITHIN 10 DAYS FROM THE IMPOSITION OF SENTENCE.

The Court may change the conditions of probation or supervised release or extend the term of supervision, if less than the authorized maximum, at any time during the period of probation or supervise release. The Court may issue a warrant and revoke the original or any subsequent sentence for a violation occurring during the period of probation or supervised release.

IT IS FURTHER ORDERED that the Clerk of the Court deliver two certified copies of this judgment to the United States Marshal of this district.

The Court orders commitment to the custody of the Bureau of Prisons and recommends: that the defendant be placed in an institution in Arizona.

The defendant is remanded to the custody of the United States Marshal.

Date of Imposition of Sentence: **Monday, April 2, 2001**

s/Susan R. Bolton Date 4/4/01

SUSAN R. BOLTON, United States District Judge